TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1922

No. [redacted]58

KEOKUK & HAMILTON BRIDGE COMPANY, A CORPORATION, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED MARCH 31, 1921.

(28,195)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 838.

KEOKUK & HAMILTON BRIDGE COMPANY, A CORPORATION, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 19, 1921.

1 In the United States Court of Claims.

No. 34114.

KEOKUK & HAMILTON BRIDGE COMPANY, a Corporation, Plaintiff,

v.

THE UNITED STATES, Defendant.

I. *Petition.*

(Filed May 26, 1919.)

The Keokuk & Hamilton Bridge Company was organized under the laws of Iowa and Illinois and was authorized by those laws and by the act of Congress of July 25, 1866, C. 246, Sec. 7 (14 Stat. 245) to construct and maintain a bridge across the Mississippi River between the towns and cities of Hamilton in the State of Illinois and Keokuk in the State of Iowa. That said bridge company had power to construct its bridge for railroad and other purposes and thereafter in 1869-70, the plaintiff bridge company did so construct and put into operation its bridge between the termini herein.

That said bridge was, what is called, a draw bridge with pivot span and pier for the purpose of turning this span so as to admit of the passage of boats and other water crafts through said bridge, both up and down the river.

That this draw span was located near the western or Keokuk side of the river and a channel made so as to admit of the passage of the boats to the west side and such condition continued until the matters hereinafter stated.

2 That prior to 1905 there existed a corporation under the law of the State of Illinois, known as the Keokuk & Hamilton Water Power Company, with power to construct and maintain a dam across the Mississippi River between the cities and towns before named, and about five hundred feet or more above plaintiff's said bridge. That during the year 1905 by an act of Congress approved February 5, 1905, this Keokuk & Hamilton Water Power Compapny had authority to build and construct a power dam across the river, between said cities and towns at said place, for the manufacture of electrical energy and the water power should erect in connection with said dam, a lock and dry dock under the direction and supervision of the Secretary of War.

Thereafter said Keokuk & Hamilton Water Power Company by authority of law, sold, assigned and transferred its corporate privileges and franchises to the Mississippi River Power Company, a corporation with power to receive and hold said franchises, and to build, construct and maintain said power dam with all the rights and privileges and under the same conditions as the said Keokuk & Hamilton Water Power Company was authorized to do.

That thereafter in about 1910, said Mississippi River Power Company did begin and during the years then following until about July 1913, did construct and put into operation said power dam, power house, lock and dry dock, all done under the supervision and directions of the Secretary of War and under and by virtue of the authorities hereinbefore in said acts conferred.

The lock so located and constructed in said power dam was somewhat to the east of north of the pivot pier of plaintiff's said draw bridge span. That by reason of such location of said lock in said power dam, boats passing up and down the river would ordinarily go through the east span of said draw bridge instead of the west as before, and thereby it became necessary for the Government in the improvement of navigation of said river through said power dam lock and the draw span of the bridge, to deepen the channel from the southern end of said power dam lock on through the eastern part of the draw bridge or to the east of the pivot pier in said draw bridge and go down the river some distance below plaintiff's said draw bridge.

3 That thereafter during the latter part of the year 1914 the Water Power Company under its conditions and obligations to the Government of the United States did blast out and deepen the east channel from said power dam lock to the said draw bridge pivot pier and the United States did of itself undertake and did blast out and deepen the said east channel from said draw bridge pivot pier, several hundred feet south, down the river, and that said work was so done under the supervision of —— Barrett, United States engineer in charge thereof at said time.

That among other things in the franchises and uses of the said bridge and its draw span, it was necessary to have what is called Protection Piers some two to three hundred feet long both ways from said pivot pier to insure boats passing up and down said river and through said draw span, safe navigation and avoidance of collisions with the pivot piper or other piers of plaintiff's said bridge. That at the time aforesaid, plaintiff did have and was using this Protection Pier as necessary for the use and operation of its said bridge and said Protection Pier was embedded in, and did rest on the bottom of the river bed.

That the United States in so blasting or excavating this channel from said pivot pier down the river did take and necessarily destroyed said Protection Pier throughout its length and breadth and did so under its authority and constitutional privileges for the improvement of navigation of said river.

That said Protection Pier was the property of plaintiff and was constructed and used by the plaintiff herein as its property and franchises as under the said act of Congress of July 25, 1866, amended and changes thereof, it was so authorized to do.

That in taking, using and destroying plaintiff's said property and Protection Pier, the United States under the Fifth Amendment to the Constitution of the United States did impliedly agree as a necessary result of the improvement of the navigation of the said river, to make just compensation for the appropriation, destruction and use of plaintiff's said Protection Pier and that a reasonable compensation

so to be made, is and was the sum of Thirteen Thousand Six Hundred Eighty Dollars and Seventeen Cents (13,680.17) and
4 said sum was due this plaintiff on or about the first day of September 1914, and for which this plaintiff claims judgment against the defendant, The United States and for all other proper orders as may seem just in the premises.

Plaintiff further states that no action, as it is informed and believes, has been taken in Congress or by any of the departments other than those referred to in the foregoing petition. That no assignment or transfer of plaintiff's said claim or any part thereof or interest therein, has been made. Plaintiff herein is justly entitled to the amount therein claimed from the United States after allowing all just credits and offsets. That the plaintiff is a corporation under the laws of the States of Illinois and Iowa with the franchises aforesaid from the Government of the United States to build and maintain its said bridge, and it has in no way, voluntarily aided, abetted or given encouragement to rebellion against the said Government and that affiant herein, believes the facts as stated in said petition to be true.

KEOKUK & HAMILTON BRIDGE COMPANY,
By FELIX T. HUGHES,
Attorney in Fact.

STATE OF IOWA,
County of Lee, ss:

I, John H. Cole, a resident of the State of Iowa, and a citizen of the United States, being duly sworn on my oath state, that I am general superintendent of the plaintiff, Keokuk & Hamilton Bridge Company, and have been for the last thirty years past. That I know the facts stated in the foregoing petition and that the allegations and statements in said petition are true, of my own knowledge, except the matters stated on the information and belief and of such matters I believe them to be true.

J. H. COLE.

Subscribed and sworn to before me, the undersigned Notary Public, in and for the County of Lee and State of Iowa, this 24" day of May, 1919.

[SEAL.] G. LLOYD NORMAN,
Notary Public.

5 H. *General Traverse.*

Filed July 26, 1919.

No demurrer, plea, answer, counterclaim, setoff, claim of damages demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

III. *Argument and Submission of Case.*

On October 18, 1920, this case was argued and submitted on merits by Mr. Felix T. Hughes, for the claimant, and Mr. Assistant Attorney General Frank Davis, Jr., and Mr. A. H. McCormick, for the defendants.

6 IV. *Findings of Fact, Conclusion of Law, and Opinion of the Court by Downey, J.*

Entered November 8, 1920.

This case having been heard by the Court of Claims, the court upon the evidence makes the following

Findings of Fact.

I.

The Keokuk and Hamilton bridge over the Mississippi River, between Keokuk, Iowa, and Hamilton, Illinois, was built and put in operation in the years 1869 and 1870 under authority granted by the laws of the States of Illinois and Iowa and an act of Congress approved July 25, 1866, 14 Stat., 244. By an act of Congress approved March 4, 1915, 38 Stat., 1220, the plaintiff company was authorized to reconstruct, maintain, and operate this bridge. Whether the construction and maintenance in the Mississippi River of the protection pier here involved was ever specifically authorized by competent authority is not shown. It was necessary in connection with maintenance of the bridge, for the safety of navigation, and was maintained with full knowledge on the part of defendant's engineer officers in charge of such matters in that district.

II.

This bridge was what is called a drawbridge, with a pivot pier and draw for the purpose of turning the span so as to admit of the safe passage of boats and other water craft through said bridge both up and down the river. To permit such boats and water craft to pass safely through this draw and to keep such boats and craft from coming in contact with the draw, span, and pivot pier as the boats so passed, it was necessary to have, and said plaintiff did have and own, what are called protection piers extending from the pivot pier both up and down the river.

7 The length of the protection pier which extended downstream was 192 feet, and it was 33 feet across. It consisted of five cribs connected by intervening fence sections. The cribs were built of timbers held together by iron or steel rods, and they were sufficiently filled with stone to cause them to settle and rest upon the bottom of the river. This pier was rebuilt in 1901, both new and old

timbers being used in the reconstruction. Between that time and September, 1913, when the acts complained of occurred, it had been damaged to some extent by being struck by a boat and by action of the currents, and the timbers had suffered some decay, but it was in serviceable condition.

III.

Prior to the time hereinafter named, boats would pass through the westerly side of this pivot pier and guide or rest against the westerly side of said protection pier and channel in passing through said bridge; and thereafter, from about 1910 to 1912, there was built, constructed, and put in operation under an act of Congress, approved February 5, 1905, a dam across the Mississippi River at Keokuk something near 900 feet above plaintiff's bridge and protection pier. This dam was authorized and was for the purpose of generating power and electrical energy and the improvement of navigation of said river.

IV.

A lock for the purpose of passing boats and other water crafts from the river below to the water above the dam, and from above down the river, was constructed under said acts of Congress, and this lock was located 900 feet above plaintiff's bridge, at such place as to require boats and other water crafts passing through this lock and up and down the river to pass through said drawbridge to the easterly side of the said pivot pier instead of the westerly as before.

V.

This necessitated the improving and deepening of a channel in the river from said lock to the easterly side of said pivot pier and down along the easterly side of said protection pier to the end and on below. This work from the dam down to the bridge devolved on the power company, but under and below the bridge along the downstream protection pier it was done by the United States. And for the purpose of improving navigation the United States, in 1913, deepened said channel from about three and one-half or four to about seven and one-half feet.

VI.

The bed of the river at said place was solid rock, and the work was done while the water was on and not by cofferdamming and removing the water and then excavating in the dry. This was done by drilling holes from a boat for that purpose, inserting explosives and blasting, and this deepening must necessarily have been near the easterly side of said protection pier so that boats would not
8 come in contact with the said pivot pier, and especially so from said pivot pier down to the end of same and on south. Drilling was done as close as six feet to the pier, but lighter blasts

were used near thereto. The work was done in the usual and ordinary way and with more than ordinary care.

VII.

During the progress of this work—by the action of the waves thrown up and on and over this pier by the blasts, and the receding thereof, and possibly by the concussion of the blasts themselves, some sections of two of the cribs and the intervening fence fell out into the river and the pier was thus so damaged as to necessitate considerable repair or a rebuilding. Government officers connected with the work knew of this damage and promised to make necessary repairs, but they were not made.

Thereafter there was an apparent necessity for rebuilding this bridge to fit it for heavier traffic than that for which it was originally intended, and by act of Congress approved March 4, 1915, the plaintiff was authorized to reconstruct this bridge, which it did, and in connection therewith this protection pier was entirely rebuilt at an expense to plaintiff of $13,680.17. The new protection pier was built wider than the old to conform to the requirements of the new bridge and the building of the new bridge would have necessitated the reconstruction of this protection pier. The value of the old pier is not shown. The damage to it could have been repaired at an expense of $1,000.

Conclusion of Law.

On the facts found the court concludes that plaintiff is not entitled to recover and that its petition ought to be and it is hereby dismissed with judgment against the plaintiff for costs of printing the record herein, the amount thereof to be entered by the chief clerk and collected by him according to law.

Opinion.

DOWNEY, *Judge*, delivered the opinion of the court:

A protection pier maintained by the plaintiff in connection with its bridge over the Mississippi River between Keokuk, Iowa, and Hamilton, Illinois, was destroyed or damaged by the United States in the prosecution of work in the improvement of navigation in that river under the circumstances shown in the findings, not necessary to repeat here in detail.

The plaintiff contends that the pier was "taken" by the United States and seeks compensation under the fifth amendment to the Constitution, fixing the amount thereof at the costs of the construction of a new pier in connection with the reconstruction of its bridge some two to three years after the alleged taking. The taking relied upon was not by an appropriation to its own use but by an alleged destruction.

Whether the pier was destroyed or simply damaged to a limited extent is for determination from the record, and the facts as found

do not sustain the plaintiff's contention with reference
9 thereto. There was not a complete destruction. There was a damage or, in other words, a partial destruction, but which the plaintiff contends was of such extent as to require rebuilding, and therefore constituted a taking of the structure.

If there was merely damage, such as might be recovered from a private corporation in an action in tort, there can, of course, be no recovery here. The proposition is advanced that if there was a tort the tort can be waived and action maintained upon the implied assumpsit, and an authority is cited in support of the proposition, but we do not regard it as seriously contended for or deem it worthy of discussion. See Bigby v. United States, 188 U. S. 400. The theory rather is that the United States was in the exercise of a sovereign right in the improvement of navigation and that it did its work in the usual and ordinary way and with more than ordinary care, as we have been requested to and have found.

Assuming for the purposes of the question that the contention of the plaintiff as to the facts is correct and that, under the circumstances stated, there was so far a complete destruction of the protection pier as to necessitate its rebuilding, can it be held that there was a taking under the fifth amendment and a resultant right to just compensation?

In other cases we have had occasion to review somewhat in detail the authorities on the question and draw some conclusions as to the necessary elements of a taking under the Constitution. County Court of Marion County, West Virginia, 53 C. Cls. 120. Sanguinetti et als., decided February 16, 1920. In the latter case we *deducted* the conclusion that—

"We may readily assume it to be settled that the basis of such an action in this court is the implied contract arising out of the appropriation of private property by the United States and the constitutional provision that it shall not be taken without just compensation."

We referred to the significance of the habitual use by the Supreme Court, in the decided cases, of the word "appropriate," discussed the elements of an implied contract, and suggested in connection therewith the fact, as it appeared to us, that there was necessarily involved an intention to take either express or of necessary implication. Further supporting that theory we referred to a recent case (Temple v. United States, 248 U. S. 121), wherein it was held that the law could not imply a promise on the part of the United States to pay for a right of way over or interest in land which it claimed to possess as its own. We drew the conclusion that this case established the proposition that even though there had been an actual invasion of plaintiff's property there could be no recovery under the Constitution if the Government claimed to own the property, because such a claim necessarily precluded the idea that there could have been any intention to take the property of another. The case was referred to because of the principle involved and not because of any analogy in facts.

Without further repeating what we have heretofore held on the

question, ascertainable in detail by reference, we suggest that this case seems clearly to be an attempt to convert an action for damages such as may not be maintained against the United States, into an action for a taking under the Constitution, inspired probably because, unfortunately for the plaintiff, there can be no recovery in any other way. Assuming the facts to justify the conclusion that there was damage inflicted on the plaintiff, it may be natural, in furtherance of our sense of justice, to incline by construction to make that actionable which in fact is not so, but such a course seems to us unjustified. It is first of all with us a matter of jurisdiction. If what happened resulted in a damage in the nature of a tort, such as against an individual or a private corporation would necessarily have resulted in an action in tort, and did not, in fact, embody the elements of a taking under the Constitution, we have no jurisdiction, and we are mindful of the well-established rules, referred to in the Sanguinetti cases, that courts must take notice of the limits of their authority, may not by construction broaden their jurisdiction, and that "judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer."

Applying the principles announced in the cases referred to, supported, we believe, by the higher authorities therein reviewed, we conclude that, even if all the facts were as contended for by the plaintiff, there was no taking under the Constitution and, therefore, can be no recovery.

Graham, Judge; Hay, Judge; Booth, Judge, and Campbell, Chief Justice, concur.

V. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Eighth day of November, A. D., 1920, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises finds in favor of the defendant and do order, adjudge and decree that the plaintiff, as aforesaid, is not entitled to recover any sum in this action of and from the United States; and that the petition herein be and the same hereby is dismissed: And it is further ordered, adjudged and decreed that the United States shall have and recover of and from the said plaintiff, the sum of Two hundred and ninety-four dollars and ninety-five cents ($294.95) the cost of printing the record in this case in this court, to be collected by the Clerk, as provided by law.

By THE COURT.

VI. *Proceedings After Entry of Judgment.*

On December 30, 1920, plaintiff filed a motion for an amendment of findings of fact and for a new trial. Said motion was overruled by the Court on January 17, 1921.

VII. *Plaintiff's Application for and Allowance of an Appeal.*

From the judgment rendered in the above-entitled cause on the 8th day of November, 1920, in favor of the defendants, and order of the Court, entered January 17, 1921, overruling plaintiff's motion for a new trial, the plaintiff, by its attorney, on the 7 day of March, 1921, makes application for, and gives notice of an appeal to the Supreme Court of the United States.

Respectfully submitted,

F. T. HUGHES,
Attorney for Plaintiff.

Filed March 9, 1921.

Ordered: That the above appeal be allowed as prayed for.

By THE COURT.

March 14, 1921.

12 Court of Claims.

No. 34114.

KEOKUK & HAMILTON BRIDGE COMPANY, a Corporation,

vs.

THE UNITED STATES.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law and opinion of the Court by Downey, J.; of the judgment of the court; of the plaintiff's application for and allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Fifteenth day of March A. D., 1921.

[Seal of Court of Claims.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 28,195. Court of Claims. Term No. 838. Keokuk & Hamilton Bridge Company, appellant, vs. The United States. Filed March 31st, 1921. File No. 28,195.

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WM. R. STANS
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1921

No. [redacted]58

KEOKUK & HAMILTON BRIDGE COMPANY,
A CORPORATION,

vs.

THE UNITED STATES.
APPELLANT,

APPEAL FROM THE COURT OF CLAIMS.

F. T. HUGHES,
Attorney and Solicitor for Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1921

No. 278

KEOKUK & HAMILTON BRIDGE COMPANY,
A CORPORATION,

vs.

THE UNITED STATES.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1921

No. 278

KEOKUK & HAMILTON BRIDGE COMPANY,
A CORPORATION,
vs.
THE UNITED STATES.
APPELLANT,

APPEAL FROM THE COURT OF CLAIMS.

STATEMENT.

This case comes to this court on appeal from the Court of Claims and the facts are fully and clearly shown in the opinion of the court below on pages 1 to 3 of Transcript of Record herein:

The Keokuk & Hamilton Bridge Company was organized under the laws of Iowa and Illinois and was authorized by those laws and by the Act of Congress of July 25, 1866, C. 246, Sec. 7 (14 Stat. 245) to construct and maintain a bridge across the Mississippi River between the towns and cities of Hamilton in the State of Illinois and Keokuk in the State of Iowa. That said bridge company had power to construct its bridge for railroad and other purposes and thereafter in 1869-70, the plaintiff bridge company did so construct and put into operation its bridge between the termini herein.

That said bridge was what is called a draw bridge with pivot span and pier for the purpose of turning this span so as to admit of the passage of boats and other water crafts through said bridge, both up and down the river.

That this draw span was located near the western or Keokuk side of the river and a channel made so as to admit of the passing of the passage of the boats to the west side and such condition continued until the matters hereinafter stated.

That prior to 1905 there existed a corporation under the law of the State of Illinois, known as the Keokuk & Hamilton on Water Power Company, with power to construct and maintain a dam across the Mississippi River between the cities and towns before named, and about five hundred feet or more above plaintiff's said bridge. That during the year 1905 by an Act of Congress approved February 5, 1905, this Keokuk & Hamilton Water Power Company had authority to build and construct a power dam across the river, between said cities and towns at said place, for the manufacture of electrical energy and the water power company should erect in connection with said dam, a lock and dry dock under the direction and supervision of the Secretary of War.

Thereafter said Keokuk & Hamilton Water Power Company by authority of law, sold, assigned and transferred its corporate privileges and franchises to the Mississippi River Power Company, a corporation with power to receive and hold said franchises, and to build, construct and maintain said power dam with all the rights and privileges and under the same conditions as the said Keokuk & Hamilton Water Power Company was authorized to do.

That thereafter in about 1910, said Mississippi River Power Company did begin and during the years then following until about July 1913, did construct and put into operation said power dam, power house, lock and dry dock, all done under the supervision and directions of the Secretary of War and under and by virtue of the authorities hereinbefore in said acts conferred.

The lock so located and constructed in said power dam was somewhat to the east of north of the pivot pier of plaintiff's said draw bridge span. That by reason of such location of said lock in

said power dam, boats passing up and down the river would ordinarily go through the east span of said draw bridge instead of the west as before, and thereby it became necessary for the Government in the improvement of navigation of said river through said power dam, lock and the draw span of the bridge, to deepen the channel from the southern end of said power dam lock on through the eastern part of the draw bridge or to the east of the pivot pier in said draw bridge and go down the river some distance below plaintiff's said draw bridge.

That thereafter during the latter part of the year 1914 the Water Power Company under its conditions and obligations to the Government of the United States did blast out and deepen the east channel from said power dam lock to the said draw bridge pivot pier and the United States did of itself undertake and did blast out and deepen the said east channel from said draw bridge pivot pier, several hundred feet south, down the river, and that said work was so done under the supervision of.....Barrett, United States engnieer in charge thereof at said time.

That among other things in the franchises and uses of the said bridge and its draw span, it was necessary to have what is called protection piers some two to three hundred feet long both ways from said pivot pier to insure boats passing up and down said river and through said draw span, safe navigation and avoidance of collisions with the pivot pier or other piers of plaintiff's said bridge. That at the time aforesaid, plaintiff did have and was using this protection pier as necessary for the use and operation of its said bridge and said protection pier was embedded in, and did rest on the bottom of the river bed.

That the United States in so blasting or excavating this channel from said pivot pier down the river did take and necessarily destroyed said protection pier throughout its length and breadth and did so under its authority and constitutional privileges for the improvement of navigation of said river.

That said protection pier was the property of plaintiff and was constructed and used by the plaintiff herein as its property and

franchises as under the said Act of Congress of July 25, 1866, amended and changes thereof, it was so authorized to do.

That in taking, using and destroying plaintiff's said property and protection pier, the United States under the Fifth Amendment to the Constitution of the United States did impliedly agree as a necessary result of the improvement of the navigation of the said river, to make just compensation for the appropriation, destruction and use of plaintiff's said protection pier and that a reasonable compensation so to be made, is and was the sum of Thirteen Thousand Six Hundred Eighty Dollars and Seventeen Cents ($13,680.17) and said sum was due this plaintiff on or about the first day of September 1914, and for which this plaintiff claims judgment against the defendant, the United States, and for all other proper orders as may seem just in the premises.

ASSIGNMENT OF ERRORS RELIED UPON.

1. The court below erred in its finding No. 1 (page 4, Tr. of R.) that whether the construction and maintenance in the Mississippi River of the protection pier here involved was ever specifiically authorized by competent authority is not shown.

2. The court below erred in holding in its opinion that there was not a complete destrucion but only damage or partial destruction to appellant's protection pier.

3. The court below erred in holding that the acts of defendant were simply a tort and could not be waived and an action maintained upon the implied assumpsit.

4. The court below erred that the facts shown did not constitute a taking under the 5th Amendment to the Constitution of the United States and appellant entitled to compensation by reason thereof.

5. The court erred in holding that in the instant case appellant could not recover under the Constitution because the Government

claimed to own the property. That is, we take it, the real estate upon which plaintiff's protection pier rested.

6. The court erred in holding that in either event whether there was a total destruction of the property or partial the taking was in the nature of damage and tort and not a taking or appropriation within the meaning of the Fifth Amendment to the Constitution.

7. The court erred in holding that the Government can commit a tort in taking or destroying appellant's property in the necessary improvement of navigation. "The Government can do no wrong."

8. *Government knew of the work and promised reparation.* In the court's 7th finding (Tr. of R. page 6) it is said: "The Government officers connected with the work knew of this damage and promised to make necessary repairs but they were not made." Our same contention in this case is that if the Government itself through its officers connected with the work knew what was being done and promised to make repairs, such acts do bind the Government under the doctrine of estoppel and because the Government itself is doing this work in the only way that it could be done and under its constitutional right to take or destroy property of another in the exercise of its power of eminent domain. We discuss the question later herein and the application and estoppel to the Government and on the question that the Government is estopped to deny appellant's title to the property.

ARGUMENT.

As to the error No. 1 assigned, "That whether the construction and maintenance in the Mississippi River of the protection pier here involved was ever specifically authorized by competent authority is not shown," we can not understand the force of the remark, "by competent authority is not shown."

"Every corporation has by necessary implication the power to do whatever is necessary to carry into effect the purposes of its crea-

tion unless the doing of the particular thing is prohibited by law or by its charter." 10 Cyc. 1097 and numerous cases from all the courts and it is further said, "The meaning rather is that it carries with it by implication a grant of the right to use all such powers as a natural person might properly and lawfully use to accomplish the same results under similar circumstances." Now it is shown by the court below that this protection pier "was necessary in connection with maintenance of the bridge for the safety of navigation and was maintained with full knowledge on the part of the defendant's engineer, officers in charge of such matters in that district." So that we may say that the grant to build and maintain the bridge carried with it the grant to build and maintain the protection piers. It will readily be seen that in a draw bridge when the draw span was turned to up and down the river to admit the passage of boats that there must be a protection pier over which this draw span would stand while the boats are passing through the draw, otherwise the boats would be destroyed. So the title of this protection pier and the ground beneath is a surety vested in this bridge as the piers or any other portion of the bridge and the Government has by the act authorizing the bridge conveyed absolutely the title to this protection pier and the ground beneath and it does belong and is the property of the bridge company.

ACTS OF OFFICERS AND AGENTS—ACTS OF THE GOVERNMENT ITSELF.

As to our 6th assignment that the court below erred in holding that the acts of the officers and agents of the Government in deepening this channel was in the nature of a tort and no recovery can be had. And such cases under the constitutional amendment we do assert that the acts of the parties in this case were not the personal acts or torts of the governmental agents in doing this work. It was a work of necessity and could not be done in any other practical way than as it was done. The Government prepares its

machinery and boats and drilling outfits and dynamite and all, and has a way of improving navigation on the rivers in the only practical way it can be done. When it is done in this way then it is done by the Government itself, and in its sovereign capacity it can and does take or destroy the property of individuals and corporations just like any other person might or should do. As said in *U. S. v. Lynah*, 188 U. S. 445, 47 L. Ed. at 547, where it is said, "The action which was taken * * * is not to be regarded as the personal act of the officers but as the act of the Government." Now since the Government can do no wrong there can be no such tort as to prevent recovery by the appellant herein.

FINDING "VII" OF THE COURT BELOW.

In this finding the court below said: "Thereafter there was an apparent necessity for rebuilding this bridge to fit it for heavier traffic than that for which it was originally intended and by an Act of Congress approved March 5, 1915, the plaintiff was authorized to reconstruct this bridge which it did, and in connection therewith this protection pier was entirely rebuilt at an expense to plaintiff of $13,680.17. The new protection pier was built wider than the old to conform to the requirements of the new bridge and the building of the new bridge would have necessitated the reconstruction of this protection pier. The value of the old pier is not shown. The damage to it could have been repaired at an expense of $1,000." Now we confess our trouble in showing to this court on this appeal any facts questioning the conclusions of the court below for as a rule their finding is the equivalent of a special verdict of a jury. We have asked by precipe the clerk of the court below to send some parts of the evidence to show on what the conclusions arrived at on this alleged finding was founded but the clerk declined to do this under the rule as he understood it and advised us that we could print the part of the record designated as a part of our brief and in that way bring the question for review before your Honors.

Our legal propositions is that an error of fact founded on undisputed evidence and against the law in such case is not one of the findings contemplated under the rule. That when facts are not disputed the construction is for the court, and not the jury.

Schuchardt v. Allens, 68 U. S. 359-369; 1 Wall. 369.

Merrick v. Giddings, 115 U. S. 300-305.

Meyer v. Houck, 85 Ia. 319.

O'Connors v. Burlington C. R. Co., 74 Ia. 383.

In this case we show to your Honors that under the authority of the Act of March 4, 1915, the appellant was bound to submit its plan for reconstruction in whole or in part to the Secretary of War for his approval. It will be seen by the printed statement printed as an Appendix to this brief on page 31 and 32 that by the statement of G. M. Hoffman, Major Corps of Engineers, which we take it, is on file in the office of the Secretary of War and which this court may officially notice at (E. D. 87623-227) where Major Hoffman says: "Nothing in the way of repairs or arrangements therefore was done and *authority for a new superstructure was finally* granted, and the work is now proceeding towards completion."

An affidavit of M. Meigs, U. S. C. E., printed here. In fact Major Meigs speaking is the Government speaking and confessing, *U. S. v. Lynah*, 188 U. S. 445. This also shows: "That the plan for reconstruction of the Keokuk & Hamilton Bridge at Keokuk, Iowa, in 1915, had nothing to do with the old piers, but simply a new superstructure upon the old piers and consisted of a heavier superstructure with the main floor of the bridge exclusively for railroad trains and upper deck for the purpose of vehicular and pedestrian travel."

It will not be claimed that the bridge or pivot pier or protection pier of appellant's could have been changed without the approval of the plan by the Secretary of War and was not touched as both parties say.

Hannibal Bridge Co. v. U. S., 221 U. S. 194; 55 L. Ed. 699.

The acts of the Secretary of War in such cases has the force and effect of law.

JUDICIAL NOTICE.

Official documents emanating from the executive and legislative departments will be judicially noticed. *New York Indians v. U. S.*, 170 U. S. 1-32, where this court says, "It is insisted that as these documents are not referred to in the findings of fact, this court can not consider them but they are documents of which we take judicial notice. We think the fact that they are not incorporated in the findings of the court will not prelude us from examining them with a view of enquiring whether they have any bearing claimed." The documents as we show were before the lower court and offered there by the Government.

Next we print the affidavit of John H. Cole, superintendent of the appellant bridge company, that there was no change in the pivot pier but simply a new superstructure and therefore there was not, nor could not have been a protection pier made wider than the old one. Nothing was done in the way of reconstructing the superstructure of the bridge to the piers or the protection pier and they could not have been wider nor narrower unless the piers themselves had been narrower or wider. Therefore we say that the court erred as a matter of law, that the protection pier was built at the expense of plaintiff to conform to the requirements of the new bridge. Since there can be no possible question under the authority of the Secretary of War and the Act of Congress and that the damage or total destruction of this protection pier was done by the Government in deepening the channel through the draw as claimed by the appellant and if appellant is entitled to recover at all it is for the reconstruction of its protection pier which was so destroyed that it must of necessity be rebuilt. The court below on page 7 (Tr. of R.), the court does conclude that even if there "was so far a complete destruction of the protection pier as to necessitate its rebuilding," it would still be true that under the Fifth Amendment appellant could not recover because even a total destruction of plaintiff's

property under the circumstances would not be a taking within the meaning of that amendment. Furthermore, we rely upon this part of our brief to the end that if the court shall find that appellant is entitled to recover under the law that the cause should be *remanded* to the court below with directions to grant a rehearing in the case to the end that appellant may recover the entire sum of $13,680.17.

ERRORS IN LAW, "BECAUSE ACTS CONSTITUTE A TAKING UNDER THE CONSTITUTION."

A "taking" may be defined as anything which would deprive one of the full and possessory enjoyment of his property real, or personal. It may be by an actual and permanent exclusion of the owner from the premises. It may be by a temporary exclusion in whole or in part. It may be an actual destruction of the land or buildings thereon or some right or interest in the same. It may be done by damage, permanent or temporary. It may be taken by casting earth, water or other material on the land. It may be by an invasion with force or casting rocks or other materials or by concussion and jarring of the earth or by smoke, smells or anything which does harm to the real enjoyment of the premises. These definitions will appear in the authorities we cite in this brief. *Nichols' Eminent Domain*, Sec. 59; Invasion of matter a taking, Sec. 58. What constitutes property within the meaning of the Constitution. *Nichols' Eminent Domain*, Sec. 173.

"The word 'property' in the Constitution, it has been said, "should have such a liberal construction as to include every valuable interest that can be enjoyed as property and recognized as such," personal as well as real.

Old Colony R. R. Co. v. Plymouth, 14 Gray (Mass.) 155.

Accordingly whenever it appears that there has been a "taking" within the meaning of the Constitution it is not merely the owner of

the fee who is deprived of his property, but *the lesser estates* and rights in the subject matter of the taking are equally protected by the Constitution.

Then in Sec. 174:

> "When land that is held by persons holding estates successive in point of time is taken for public use, each is entitled to compensation. The remainder-man or revesioner must of course be paid, and it has never been seriously disputed that life tenants and lessees for years, from year to year, or even at will, stand within the constitutional protection."

See Sec. 175:

> "Easements, both positive and negative, in the land taken, and rights in the nature of easements are generally held to be property. As it has been shown at some length, in the two previous chapters."

Now these cases certainly secure to this bridge company its property and the franchise and right to maintain this pier as an essential part of the franchise to build, own and maintain the bridge, and it is as much property as any other kind of property could be, and it absolutely owns the ground on which it rests and the pier itself as much as any owner could have in the lands of the soil, grants of the Government. and as shown in the *Monongahela Navigation Company v. United States,* 148 U. S. 312-341, the destruction of this pier by the invasion of force of rocks and water called upon the Government to pay for it under the Fifth Amendment to the Federal Constitution.

In *Yates v. Milwaukee,* 10 Wallace U. S. 497, 504 and 505, it is held by the Federal Supreme Court:

> "The owner of land bounded by a navigable river has certain riparian rights, whether his title extends to the middle of the stream or not.
>
> Among these are, free access to the navigable part of the stream, and the right to make a landing, wharf, or pier for his own use, or for the use of the public.
>
> These rights are valuable, and are property, and can be taken for the public good only when due compensation is made.
>
> They are to be enjoyed subject to such general rules and laws as the legislature may prescribe for the protection of the public right in the river as a navigable stream."

Page 504, Mr. Justice Miller in the opinion further says:

> "It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation."

On page 507, the Justice further says:

> "On the whole we are of opinion that Sheparson, as riparian owner of a lot bounded by a navigable stream, had a right to erect this wharf, and that Yates, the appellant, whether he be regarded as purchaser or as licensee, has the same right; and if the authorities of the city of Milwaukee deem its removal necessary in the prosecution of any general scheme of widening the channel an dimproving the navigation of the Milwaukee River, they must first make him compensation for his property so taken for the public use."

Now it is true that in this case the Government in improving the navigation of the Mississippi River took plaintiff's pier and destroyed it in whole or in part by the invasion of the same with force, water and rock, and did at least for the months while the Government was doing this work absolutely have possession and control of this property, and excluded the plaintiff from it as perfectly as if it had excluded them by force and arms under the writ of an officer duly authorized. It is undisputed that no one could remain on or about this pier while this blasting and deepening of this channel was going on.

The taking need not be the fee in the land nor followed by permanent possession. Temporary use and occupation for any cause will render the parties who take liability in damages as a means of compensation under the Federal Amendment. *United States v. Cress*, 243 U. S. 316, 61 L. Ed. 746-753. Now the court below cited with approval the case of *Temple v. United States*, 248 U. S. 121, wherein it was held:

> "That the law could not imply a promise on the part of the United States to pay for a right of way over or interest in land *which it claimed* to possess as its own."

And the court below said:

> "We drew the conclusion that this case establishes the proposition that even though there had been an actual invasion of plaintiff's property, there could be no recovery under the Constitution if the Government claimed to own the property, because such a claim necessarily preclude the idea that there could have been any intention to take the property of another."

Now we do not question this proposition; it is the settled purpose of law in this and the Federal Supreme Court. Now the appellant's whole case rests upon the fact that it is the absolute owner in every sense of the word of its bridge, and protection piers and moreover that by the act of the respective States of Illinois and Iowa and the approval and granting of the franchise by the United States through Congress, every right of navigation beneath the bottom of the river and above was absolutely vacated and vested in the Bridge Company and the United States is estopped from questioning that title or right and does not wish nor has it shown any act whatever that it desires to question the property and franchise right of the plaintiff to the property in this bridge and protection pier. The Bridge Company must protect and maintain the protection pier as a part of its right to build the bridge and the maintenance of this protection pier is for the benefit of the *Government in navigation* and in a sense not for the benefit of the Bridge Company at all. Rather a burden in consideration of the other franchise.

Now these questions were settled in the *Monongahela Navigation Co. v. The United States,* 148 U. S. 312, and that case has never been questioned but affirmed time and time again and in *Louis Bluepoint Oyster Cultivation Co. v. Briggs,* 229 U. S. 82, 57 L. Ed. 1083-1086, where referring to the Monongahela case says:

> "That case really rests upon estoppel, the lock and dam had been constructed at the instance and implied invitation of Congress."

And then said:

> "This is something more than mere recognizing of an existing fact, it is an invitation to the company to do the work and when in pursuance of that invitation, and under authority given by the State of Pennsylvania, * * * the company has

> constructed the lock and dam, it does not lie in the power of the state or the United States to say that such lock and dam are an obstruction and wrongfully there, or that the right to compensation for the use of this improvement by the public does not belong to its owner, the Navigation Company."

So that the line of cases referred to by this and the Federal Supreme Court which would militate against the right of plaintiff's recovery in this case, if it did not own the property and the United States claimed to own it, therefore did not intentionally take it, has no place in the case at bar whatever, and the only question must be whether what the Government did in the improvement of navigation of this river alongside of appellant's bridge pier amounted to a taking in whole and in part or damaging plaintiff's property temporary or permanent, and if so the appellant is entitled to compensation therefor, and the amount the evidence shows it has suffered in the case. The question we believe has been settled by the case of *Pumpelly v. Green Bay & M. Canal Co.*, 13 Wallace 166, 177, 20 L. Ed. 557-560; *U. S. v. Lynah*, 188 U. S. 445, 468-470, 47 L. Ed. 539, 547, 549, 23 Sup. Ct. Rep. 349, and *U. S. v. Cress*, 243 U. S. 316, 328, 61 L. Ed. 746, 753. In this last case the Federal Supreme Court reviews the authorities and under which we believe that appellant is entitled to recovery in this case the damages sustained. There is no more right in the Government to take a building and destroy it or damage it than it would be in taking the land and buildings and fixtures thereon all constitute the land itself and one is as sacred from the taking or injury as the other, and the invasion may be by actual taking or for that matter with force and arms, or it may be by water or concussion and blasting by rocks. The authorities we cite on page 167 of our former brief and *Richard v. Washington Terminal Co.*, 233 U. S. 546, 557, 58 L. Ed. 1088, 1091, can leave no doubt in the minds of your Honors that there has been a "taking" of appellant's property within the meaning of the Fifth Federal Amendment, and if so, what is compensation for such taking, and it is perfectly clear that it is the damage shown by the acts of the appellee, and when a building or structure on one's property is absolutely destroyed in whole or in part that which is destroyed is as

permanently taken as if it were absolutely burned up, there can never be any return of it, so that the taking would not be temporary because it is not returnable; it does not exist. In such a case the Tucker Act authorizes a recovery on an implied contract or obligation to pay and in such case if there be a tort which we claim there is not in this kind of a case such as would not render the Government liable for the wrongful conversion of this property can be waived and suit brought in assumption upon the implied promise and in this regard we think *Guerini Stone Co. v. Cullin Construction Co.*, 248 U. S. 334, 63 L. Ed. 275, states the law at this time. We do not question the authority that the Government is not responsible for the tortious acts of its officer in the performance of their duties, but there is a wide difference where the Government must take property in the improvement of navigation and must take this property by deepening the channel of the river with four or five feet of water on it and that the water must not be cofferdammed off or removed because navigation must be continued and the only way that this channel can be deepened and right along adjacent to the walls of the protection pier under this water to the bed of the river and twenty or thirty feet above the water so as to guide boats safely through the draw and when this work is done by the officers in the only and careful way it can be done by blasting with dynamite under the water and dredging and when done in this way necessarily and without the fault of anyone the Government must take or possibly destroy this protection pier or the walls of it. It is lawfully taken and not tortiously as much as any Government officer or commander of the army would take property under the circumstances and expect the Government to pay for it, and there does arise in such cases an implied promise where condemnation is not before had to ay the damage done.

Now then turn back to the case of *United States v. Cress*, where the Supreme Court quoting from the Lynah case says:

> "But it is the character of the invasion, not the amount or damage resulting from it, so long as the damage is substantial, that determines the question whether it is taking."

Approving what was said in the Lynah case:

> "Where the Government by the construction of a dam or other public works so flood lands belonging to an individual as to substantially destroy their value, there is a taking within the scope of the Fifth Amendment. While the Government does not directly proceed to appropriate the *title,* yet it takes away the *use* and *value;* when that is done it is of little consequence in *whom* the *fee* may be vested. Of course, it results from this that the *proceeding* must be regarded as an *actual appropriation* of the land, including the possession, the right of possession, and the fee; and when the amount awarded as compensation is paid, the title, the fee, with whatever rights may attach thereto,—in this case those at least which belong to a riparian proprietor,—pass to the Government and it becomes henceforth the full owner.' * * * If any substantial enjoyment of the land still remains to the owner, it may be treated as a partial instead of a total divesting of his property in the land. The taking by condemnation of an interest less than the fee is familiar in the law of eminent domain. Where formal proceedings are initiated by a party condemning, it is usual and proper to specify the precise interest taken, whether less than the fee. But where, as in this case, the property owner resorts to the courts as he may, to recover compensation for what actually has been taken upon the principle that the Government, by the very act of taking, *impliedly* has *promised* to make compensation because the dictates of justice and the terms of the Fifth Amendment so require."

Citing cases and further:

> "And if it appears that less than the whole has been taken and is to be paid for, such a right or interest will be deemed to pass as is necessary fairly to effectuate the purpose of the taking; and where as, in this case, with respect to the 6 6-10 acres, land is not constantly but only at intervals overflowed, the fee may be permitted to *remain in the owner,* subject to an easement in the United States to overflow it with water as often as necessarily may result from the operation of the lock and dam for purposes of navigation."

Then the case *United States v. Welch,* 217 U. S. 333, 54 L. Ed. 787, at 789, where it is said:

> "The petition like the form of the findings lends some countenance to this contention by laying emphasis on the damage

> to the farm, although it is to be noted that even in this respect the damage is to the tract of which a part is taken." 191 U. S. 354. "But both petition and finding in substance shows clearly the way has permanently been cut off. A private right of way is an easement and is land. We perceive no reason why it should not be held to be acquired by the United States as an incident to the fee for which it admits that it must pay. But if it were *only destroyed and ended a destruction for public purposes* may as well be a *taking* as would be an appropriation for the same end."

Now there can be no question about this language, call it damage, taking or appropriation, and all the same it is taken for public use and must be paid for.

So we say this protection pier as often as it becomes necessary for the Government to improve this channel and in so doing to injure and destroy in whole or in part this protcetion pier, it is a taking and for which compensation must be made. Now your Honors will see in the further reading of the Cress case that they did allow Cress for this private way and damage to the ford $500 as damages for the injury to this property and then says:

> "This brings the case squarely within *United States v. Welch,* 217 U. S. 333, 339, 54 L. Ed. 787, and etc."

So that we do believe that under all these facts and circumstances there should be no controversy about the duty of the Government to pay, and quoting from *Richard v. Washington Terminal,* 233 U. S. 546, 557, 58 L. Ed. 1088, 1091:

> "All this being granted the special and peculiar damages to the plaintiff as a property owner in close proximity to the portal is the necessary consequences. * * * Construing the Acts of Congress in the light of the Fifth Amendment they do not authorize the imposition of so direct and peculiar and substantial a burden upon plaintiff's property without compensation to him."

And why should the Government ask this Bridge Company that has expended its millions on this bridge and its thousands in this protection pier for the benefit of the Government in navigation be compelled to stand this substantial burden alone, why not distribute

this burden to the public for whose benefit it was incurred? And as said in *Herman on Estoppel and Res Judicata,* p. 217 and 218, and other state and federal courts, as to when the Government by reason of its sovereign capacity may claim exemption from legal proceedings, so that when the Government enters the courts of the country as a litigant they waive this exemption and stand on the same footing with private individuals, and in the Court of Claims, the Government, like an ordinary suitor is subject to all the rules, limitations and liabilities applied to individuals under like circumstances, and these rules and principles must tend alike to broaden the Fifth Amendment to its application to the individual rather than limit it, and clearly have done so as fully illustrated in the later cases of the Federal Supreme Court and is.

I think when the Government parted with the ground on which this protection pier was built and knowing that it might be called upon any time to improve navigation in the water immediately adjoining in this protection pier in the interest of navigation, that in making this grant, the right to make these improvements as a necessary incident to the grant reserved the right to do precisely what it did do and if done with proper care and caution will simply be a "taking" as a necessary right retained, and an implied agreement to pay for it.

We do not claim in our petition that there was any tort or wrongful "taking" of appellant's property by the agents of the Government in doing the work, but we averred and proved that it was done in the most careful and economical way in which it could be done, and that the injury complained of was the necessary results of the work to be done, and this distinction is clearly shown in the *United States v. Lynah,* 188 U. S. *supra,* and the *Monongahela Navigation Co.* case and in the Cress case. We recognize the distinction between our case where we have a grant from the Government to maintain the bridge and protection pier, from the case where one does, as in the Chicago River case, the tunnel is under the river, and when the Government in exercise of its sovereign right deepens the river and interferes with this tunnel, the Government owes no duty because it has given no privilege nor divested itself of any right to

improve the channel. This right is superior at all times to any other right and any claim or right to use a portion of the river bed for bridge, pier or protection pier or dams for preserving water must come from the sovereign government, but when that government has offered and induced another to go upon the river bed or its banks and do some lawful work as that is done, so much of the navigable part of the river as has been granted away, is away, and no longer any part of such river and not needed for it. It was granted in the aid of interstate commerce, so that commerce could go across the river as well as on the river and the rights and duties must be shared to the ends of the greatest good for the greatest number.

Prior to 1905, the Government had canal and locks to get from Keokuk up the Mississippi River to Montrose about ten miles up. The Government in the improvement of navigation and creation of water power granted to the Keokuk & Hamilton Water Power Company, by the Act of February 9, 1905, the right to build and maintain a dam and power house, locks and dry docks and the right to submerge the old canal and all this was done and the great dam was completed and all the works at a cost of probably $35,000,000, would counsel claim that the Government could now turn round and tear down this dam and power house and restore the old locks because some engineer or the Secretary of War concluded the old was preferable to the new and the power company people lose their millions would not everyone hold up their hands and cry injuctice? The Government can't do this. The Fifth Amendment protects the people and just compensation must be paid, and this as we understand is the main ground on which the Government in this case in its sovereignty claims it can do as to the bed and banks of this navigable river. These questions have all been settled and justly so by *Monongahela Navigation* case in 148 U. S. 312 and the cases affirming the principles therein announced.

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GOVERNMENT ADAPTED USE OF DYNAMITE AND IS BOUND THEREBY.

The Government adopted and put in use that powerful explosive dynamite, and it is held to be dangerous, so much so, that the party using it for blasting purposes is held liable to adjacent property owners without any proof of *negligence*.

> "This maxim of the common law, '*Sic utere tuo ut alienum* non laedes', is so well established and so universally recognized that it needs neither argument or citation that this is no longer its support. But it must be conceded that this is no longer the law, if the owner of a lot may employ such means in the improvement in the use of his property as will naturally and necessarily result in the destruction of adjoining property. * * * If the means employed will, in the very nature of things, injure and destroy his neighbor's property, notwithstanding the highest possible care is used in the handling of the destructive agency, the result to the adjoining property is just as disastrous as if negligence had intervened. If one may knowingly destroy his neighbor's property in the improvement of his own it is little consolation to the neighbor to know that his property was destroyed *with due care and in a scientific manner.*" Louden v. Cincinnati (Ohio), 106 N. E. 970.

To the same effect see *Watson v. Mississippi River Power Company*, 174 Ia. 23, 29 and 30. Thompson in his commentaries on the law of negligence, Vol. 1, Sec. 753, *U. S. v. Arthur Lynah*, 188 U. S. 445, *U. S. v. Cress*, 61 L. Ed. 746, *Pumpelly v. Green Bay and M. Canal Co.*, 13 Wall. 166, 20 L. Ed. 557, *Richards v. Washington Terminal Co.*, 232 U. S. 546, 557, 58 L. Ed. 1088-109.

Temple v. U. S., 248 U. S. 21, 63 L. Ed. 162-165.

St. Louis v. Rutz, 138 U. S. 226, 34 L. Ed. 941-947.

West Chicago Street R. Co. v. Illinois, 201 U. S. 506, 520, 50 L. Ed. 845, 850.

United States v. Chandler Dunbar Water Co., 229 U. S. 53-62, 57 L. Ed. 1063-1075.

Louis Bluepoint Oyster Cul. Co. v. Briggs, 229 U. S. 882, 57 L. Ed. 1083.

On page 165 of the Temple case in the Federal Supreme Court it says:

> "If the plaintiff can recover, it must be upon an implied contract, for, under the Tucker Act, the consent of the United States to be sued is (so far as here material) limited to claims founded 'upon any contract, express or implied'; and a remedy for claims sounding in tort is expressly denied. * * * The law will imply a promise to make the required compensation, where property to which the Government asserts no title is taken, pursuant to an act of Congress, as private property, to be applied for public uses; or, in other words: 'Whenever, in the exercise of its governmental rights, it takes property, the *ownership* of which it concedes to be in an individual, it impliedly promises to pay therefor.' But the case at bar, both the pleadings and the facts found preclude the implication of a promise to pay. For the property applied to the Public use is not and was not conceded to be in the plaintiff."

This distinction between the two lines of cases is so clearly drawn in this last case, that we feel there can be no doubt for the right of appellant's recovery in this case, because the parties assert absolute title in the appellant to the protection pier under the franchise to build and maintain the bridge and that no right or title remains in the Government to this part of the river, and from the causes, we assign and the evidence in this case and the law, appellant is entitled and the Government has implied a promise to pay for the property taken in this case.

And the Government adopting and using these means is estopped from claiming exemption from such use. It will not do to say the officers and engineers in charge of the work are negligent, and therefore, the Government is not liable the agents and officers are not doing it, they are simply carrying out the master's instructions. They do not buy nor pay for this material, simply using the master's tools and implements in doing the work and why should not the Government pay for all such work. It is but the advanced and economic way in which such things are done, courts take judicial notice that the only practical way to deepen the river is by blasting out the channel without first removing the water and the Govern-

ment can many times more do the work in this way than the old way of cofferdamming off the water and then blast with black powder, so that to say the Government can knowingly use the dangerous explosives and tear the adjacent walls of other's buildings and properties and not be liable like any other people, is to hide under the cover of sovereignty, and that it does not wish to do. Better pay for the property damages, taken or destroyed, the same as for that which it actually takes.

ESTOPPEL.

When the United States consents to go into court and make contracts and does things that people do among themselves, then the Government lays aside its sovereignty and the court will incline to the citizen rather than the Government in question of doubt for fear of doing injustice to such citizen. In all the courts of law actions must be tried as such, and chancery as such, and the Government must do equity and may be subject to estoppel and other rules of court, precisely like the citizen.

The Government must prepare at the great expense of building and constructing a boat from which holes may be drilled in the water from the sides of these boats and when as in the instant case some 20 to 40 holes of the size and depth, then these holes are filled with sticks of dynamite and attached by electric wires. The boat is then removed a safe distance and the complement of holes fired as shown in the evidence in the record at pp. 30 and 31, y. 13. Then the loosened rock is dredged and boated away, so this is the way the Government does the work and it is not necessarily done *negligently*, as Bassett says, R. 17.

> "They used dynamite instead of black powder because the work must be done under water."

And the Government by the adoption and use of this explosive renders it liable for injuries on an implied promise to pay, well

knowing that in doing this work in this way damages and destruction of near adjacent property will surely follow but still even after paying for such damages, the Government is many times ahead both in time and money, and why should not the Government pay what it takes and destroys in this way as well as for the immediate bed in cases where such bed or property taken must be condemned and paid for under the Fifth Amendment.

What is the difference whether this protection pier is destroyed by force of rocks and other materials cast against it or water blown from the bed of the river four to six feet below it in the rock by these terrific blasts raising as the witness say 100 feet square of the river bed and the water on top, as high as a house and letting it fall in or out of the cribs and frame work of the pier, nothing can withstand such blasts and nothing can be more forcible than water. In any event this pier was totally destroyed and as the undisputed evidence is, was in good working order and of sound timbers at the time. The one thing certain is the pier was good and going when the work began and absolutely destroyed when the work was finished and the Government does not pretend to show any other cause but the one which actually did the work.

THE GOVERNMENT PROMISED TO PAY.

There is no question about the fact that the Government through its duly authorized agents of the War Department agreed to pay or repair the damages done to this protection pier when protest was made by the Bridge Company. These agents can, of course, bind their principal by contracts made in the usual course of the business being done and as we have before said, it was the Government doing this work and not these officers or agents and we know of no rules of law or equity which exempts the Government from its obligations made under works of necessity and only difference was that the officer was unable to obtain a dredge boat as suggested to clear off

entire pier to the end that it could be rebuilt and the Government did not pay or make the repairs and there could be no repairs when it was examined and all agreed to this. The only thing was to clear off the foundation and rebuild which as we have said, cost them $13,680.17, and by all the rules of fair dealings of the Government in such cases asks no other your Honors findings should be that the money necessary to put this pier in a workable condition was the amount above stated and that the findings of your Honors should so read.

United States may be *estopped* in court proceeding, Herman on Estoppel and Res Judicate, p. 217 and 218, where it is said:

> "The United States, by virtue of their sovereign character, may claim exemtion from legal proceedings, but when they enter the courts of the country as a litigant they waive this exemption and stand on the same footing with private individuals. Unless otherwise provided by statute, the same rules as to the admissibility of evidences are then applied to them; the same strictness as to motions and appeals is enforced; * * * and when they go into a court of equity for relief against a judgment, they must equally present a case by allegation and proof entitling them to equitable relief. * * * All the attendant circumstances of each case will be weighed, that no wrong be done to the citizen, though the Government be the suitor against him. Thus in a court of claims, the Government like an ordinary suitor is subject to the principle of *res adjudicata* and the defendant may, in a proper case, invoke the maxim *nemo debet bis vexari*. So where the sovereign power confides to a tribunal a right to sell lands, and to determine between purchasers who has the better right, this power is exclusive and its determinations conclusive, not only on the parties claiming right to purchase but on the seller."

Fendall v. U. S., 14 Ct. of Cl. 247.
United States v. Throckmorton, 98 U. S. 61.
Cunningham v. Shanklin, 60 Cal. 119, and other cases."

And on p. 1269, the same author says, Sec. 1132:

> "The Government of the United States, as well as individuals, may be bound by estoppel. For instance, in the case of

a mistake in the survey, and the parties building on the land, nor can the United States object to a boundary line in an approved survey, if they have not appealed from the decree approving the survey."

R. R. v. Shurmeier, 7 Wall. 272.

Bates v. R. R., 1 Black 204.

R. R. v. R. R., 26 Minn. 31.

Lindsey v. Haines, 2 Black 554.

"Then in Louis Bluepoint Oyster Cultivation Co. v. Briggs, 229 U. S. 57 L. Ed. 1083-1086, your Honors will see that in reference to the Monongahela Nav. Co. v. U. S., 148 U. S. 312, where stating that this case, 'Allowed the owners of a lock and canal and franchise to take tolls were awarded compensation, not only for the tangible property, but for the value of the physical property and the State law franchise to take tolls."

The Court said referring to the Monongahela case:

"That case really rests upon estoppel, the lock and dam had been constructed at the instance and implied invitation of Congress."

So with plaintiff's bridge, it was constructed under authority of the laws of Illinois and Iowa and the franchise and authority of Congress of July 25th, 1866, and as we show by the decision of the courts was a lawful bridge. Now the Supreme Court in the *Louis Bluepoint* case, *supra,* the Federal Supreme Court says further:

"This is something more than mere recognition of an existing fact. It is a pursuance of that invitation and under authority given by the State of Pennsylvania, the Company has constructed the lock and dam it does not lie in power of the State or the United States to say that such lock and dam are an obstruction to commerce and wrongfully were they are that the right to compensation does not belong to the navigation company."

We may explain here that under the Act of Congress, approved July 25, 1866, the law of the United States, Chap. 246, An Act to Authorize Construction of certain Bridge and to establish them as Post Roads, under Sec. 2 it is said: "And said spans shall not be less than thirty feet above low water mark and not less than ten above extreme high water mark.

Now as we have said, the superstructure of this bridge made in 1869 and 1870, was too light for modern traffic and the Company concluded to put a new superstructure with heavier steel and to make an upper deck for the use of vehicular and footmen, and this heavier material would necessarily reach lower down the "bottom of the cord of the bridge", the only thing the Company could do to build this superstructure on the old piers would have to lower the cord a foot or two, so as to keep within this law it was suggested that if this Bridge Company could have an Act of Congress putting this bridge under what we may call the General Bridge Act approved March 23, 1916, then it would be within the power of the Secretary of War to approve the plan of the Bridge Company as contemplated and hence, the aplication to Congress and the assage of this bill approved March 4, 1915, all of this was done and the plan approved by the Secretary of War, and as Major Hoffman says: "Authority for a new superstructure was finally granted, and the plan (approped) and the work is now proceeding toward completion, that was July, 1916, and no new bridge with new pier or any protection piers was ever thought of, only a new superstructure on the old piers, and this approval of these plans by the Secretary of War has the force and effect of law and of course your Honors will take judicial notice of the same, and I take it these plans are in the War Department in Washington now and counsel for the Government can supply your Honors, and all will show that a new bridge with new piers and new protection piers were never thought of.

We feel that the affidavits "A", "B" and "C" we print herewith being statements from both sides will at least enable your Honors to better understand our position that the building of the new superstructure of the bridge in 1915 and 1916 had nothing whatever to do with the deepening of the channel and blasting, nor with the protection pier or its destruction and rebuilding, simply the contractors to rebuild the bridge took a contract from the Bridge Company to rebuild the protection pier as extra work, Cole R. 25, y. 33, and the price for doing the same would be on the same unit basis as the work

of reconstruction and the contractors did rebuild this pier when they got through with the other work and the pier work came to $13,680.17 and the Bridge Company paid that sum.

We believe as a matter of law that when your Honors have considered the facts of the case in view of the law as we now try to present it, there will arise in the minds of your Honors a conviction that in the deepening of this channel at the place and under the conditions and circumstances there was a necessary taking and destruction of plaintiff's property for public uses and an implied obligation to pay for the same.

We believe that the case of *John Horstmann Co. v. U. S.* decided in this court Nov. 21st, 1921, supports our contention that the appellant's property in controversy must and should be paid for "and can not be destroyed to the damage of plaintiff's protection pier without compensation to appellant, and that what the defendant did to appellant's property amounted to a taking or appropriation within the meaning of the Fifth Amendment to the Constitution; and that the cases your Honors refer to in the opinion,

Temple v. U. S., 248 U. S. 121, 63 L. Ed. 162, and we may add,

Richard v. Wash. Term., 233 U. S., 546, 557, 58 L. Ed. 1088-1091, where it is said:

> "All this being granted the special and peculiar damages to the plaintiff as a property owner in close proximity to the portal is the necessary consequences. * * * Construing the acts of Congress in the light of the Fifth Amendment they do not authorize the imposition of so direct, peculiar and substantial a burden upon plaintiff's property without compensation to him."

And as said by the court below (Tr. of R. page 8): "Assuming the facts to justify the conclusions that there was damage inflicted on the plaintiff it may be natural in furtherance of our sense of justice to incline by construction to make that actionable which in fact is not so." Now take this language and what this court said in the Richard case that "in the light of the Fifth Amendment they do not authorize the imposition of so direct, peculiar, and substantial a burden upon plaintiff's property without compensation to him."

And why not; these imrovements in navigation are for the benefit of all the people, and why should not all the people, in the sense of the power of eminent domain, join in and pay for them and not cast it upon the one individual?

The *Horstmann* case is distinguished only when this court says: "We think the cases at bar are within the later decisions and it would border on the extreme to say that the Government intended a taking by that which no human knowledge could even predict. Any other conclusion would deter from useful enterprise on account of a dread of incurring unforeseen and immeasureable liability." This comment is of a special pertinence but the result of the Government's work to the properties of plaintiff could not have been foreseen or foretold is a necessary deduction from the finding of the Court of Claims. The court found that there is obscurity in the movement of percolating waters and that there was no evidence to remove it in the present case and necessarily there could not have been foresight of their destination or purpose to appropriate the proerties." These are the troubles this court encountered in trying to fix the measure of liability of the Government in that case, but when applied to the Lynah, Cress and other cases has no application whatever. In the appellant's case the measure of liability and what the Government could easily have foretold was the cost of reparation. The discussion of the court below on these propositions show that there was no trouble in determining if the facts were as claimed, how much damage to plaintiff's protection piers had been caused by the acts of the Government, or what it would have cost to reconstruct anew the appellant's protection pier. So that from every point of view this court must hold that the appellant's property was taken of necessity, and while the Government was doing this work in its most careful and skillful manner and for the improvement of navigation on that part of the river through which commerce up and down the river must pass because the Government had ceded away all the rest of the river in the Act authorizing the building and maintenance of appellant's bridge, and in a sense in the interest of commerce across the river there must be some obstruction in navigation up and down the river, the Government

must deepen the channel to permit of this navigation and must see to it that navigation is not obstructed for want of this draw bridge, pivot pier and protection pier; and that to destroy or take away appellant's protection pier without compensation is and would be the same as to take away apellant's bridge entirely, which it may be conceded it could not do under the case of *Monongahela Navigation Co. v. U. S.*, 148 U. S. 312, which has never been questioned, but affirmed time and time again, as in *Louis Bluepoint Oyster Co. v. Brgigs*, 229 U. S., 82, 57 L. Ed. 1088-1086. We believe that upon principle and authority the appellant is entitled to recover in this action and that the judgment of the court below should be reversed.

Respectfully,

F. T. HUGHES,
Attorney and Solicitor for Appellant.

APPENDIX.

EXHIBIT "A".

The Government in its defense and under the laws of Congress in cases like the one in controversy filed the following record, p. 119, U. S. E. O. Rock Island, Illinois, July 18th, 1916:

To the Chief of Engineers, U. S. Army, Record p. 120. Shortly afterwards it became evident that a new bridge with new protection piers would have to be built, therefore nothing in the way of repairs or arrangements therefore was done and authority for a new *superstructure* was finally granted (E. D. 87623-227) and the work is now proceeding towards completion.

G. M. HOFFMAN,
Major Corps of Engineers.

Record p. 245.

AFFIDAVIT—EXHIBIT "B".

I, Montgomery Meigs, being duly sworn on my oath, do say that I am now and for many years past have been the United States Civil Engineer of the War Department of the sub-office at Keokuk, Iowa, and do state the plan for reconstruction of the Keokuk & Hamilton Bridge at Keokuk, Iowa, in 1915, had nothing to do with the old piers, but simply a new superstructure upon the old piers, and consisted of a heavier superstructure with the main floor of the bridge exclusively for railroad trains and an upper deck for the purpose of vehicular and pedestrian travel, and this was all that was done under that plan so far as I know.

M. MEIGS, U. S. C. E.

AFFIDAVIT—EXHIBIT "C".

I, John H. Cole, being duly sworn, on my oath do state:

1st. That I am and have been for the last thirty-eight or nine years superintendent of the Keokuk & Hamilton Bridge at Keokuk, Iowa, and that I have measured the distances between the east edge or end of the pivot pier of the draw and the west edge or end of the next pier, which we call the rest pier at water level of said Keokuk & Hamilton Bridge at Keokuk, and find this distance to be 160 feet. I have measured the width of the south protection pier of said draw bridge and find that to be 35 feet and 4 inches. I have measured the north or upper protection pier of the same bridge and find that distance to be the same as the south protection pier, that is, 35 feet and 4 inche swide. I further state that there has been no change in the width of these protection piers at any time and say that the north and south protection piers are of the same width they have always been and when the south protection pier was rebuilt in 1915, it was built precisely on the old foundation and exactly the same width that the older one was and remains the same now, and the width of both said north and south protection piers are the same width now as they have always been. I further say that as the

protection piers are made of the same width as the pivot piers, they could not be made wider than they are and have been without reducing the distance of 160 feet between the edges of said piers before, and that the north protection pier was only damaged some by the deepening of the channel north of the pivot pier and was repaired and no change was made as to its width or length in that respect whatever, and the same remains there today of the same dimensions as it has always been during my stay as superintendent. That the rebuilding of the superstructure in 1915 and 1916 had nothing whatever to do with the piers or protection piers, simply a new steel superstructure on the old piers with a main floor for railroads and an upper deck or floor for vehicles or pedestrians.

JOHN H. COLE.

F. T. HUGHES,

Attorney and Solicitor for Appellant.

In the Supreme Court of the United States

OCTOBER TERM, 1922.

KEOKUK & HAMILTON BRIDGE COMPANY, a corporation, appellant, *v.* THE UNITED STATES. } No. 58.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF FACTS.

The findings of fact show that the appellant, Keokuk & Hamilton Bridge Company, had built a bridge across the Mississippi River and, in connection with such bridge, maintained a protection pier which extended from the bridge down stream. In September, 1913, this protection pier was in a damaged condition and the timbers had suffered some decay. (Finding II.) Prior to that date, the Mississippi River Power Company, a private corporation, was building a power dam across the river for the generation of electric power, and, as it was thus using a navigable stream, this power plant was being con-

structed subject to the approval of the United States Government, in order that it should not interfere with navigation. In constructing this dam, and "for the purposes of improving navigation," the United States undertook, in 1913, to deepen the channel of the Mississippi River. (Finding V.) It thus became necessary to excavate some solid rock at the bottom of the river, and this was done by the use of explosives. "The work was done in the usual and ordinary way, and with more than ordinary care." (Finding VI.) In thus deepening the channel for the purposes of navigation, the blasting of the river-bed rock, either by concussion or by the action of the waves thrown up in blasting, caused further damage to the protection pier in question. (Finding VII.) It subsequently became necessary to rebuild the appellant's bridge for "heavier traffic," and this necessitated the reconstruction of the protection pier. But for this reconstruction of appellant's bridge to meet the demands of "heavier traffic," the damage to the old pier "could have been repaired at an expense of one thousand dollars"; but the new protection pier cost $13,680.17. (Finding VII.)

Under these facts the question arises whether the Government is liable, in deepening the channel of a navigable stream, for the incidental damage of such work to an old pier which in any event had to be abandoned and supplanted with new construction, not because of the Government's work, but because

the appellant, to meet the demands of "heavier traffic," was obliged to rebuild its bridge.

ARGUMENT.

When the United States Government permitted the appellant to build a bridge across the Mississippi River the appellant accepted its franchise on the implied condition that the bridge was at all times subject to the paramount authority of the Federal Government to do whatever was necessary to protect and maintain the navigability of the Mississippi River. If, for example, the height of the bridge's span, with the growth of commerce, had become insufficient to permit the passage of vessels, it can not be denied that the Government, to maintain the navigability of the river, could order the appellant to reconstruct the bridge so that vessels of greater height could pass under it.

This reservation of power does not rest upon implication; for the appellant's bridge was built under the provisions of the act of July 25, 1866 (14 Stat. 244), which was a general act authorizing the construction of bridges across the Mississippi River at different points and prescribing the conditions upon which such permission should be granted. The last section provided (p. 246):

> SEC. 13. *And be it further enacted*, That the right to alter or amend this act, so as to prevent or remove all material obstructions to the navigation of said river by the construction of bridges, is hereby expressly reserved.

That the Government is not liable for damages necessarily incurred in the work of maintaining or improving the navigability of a river is shown by a long line of decisions of this court, of which the most recent is the case of *John Horstmann Company* v. *United States*, decided November 21, 1921. In that case, the United States constructed an irrigating system, and, in impounding the waters of the Truckee River, it caused, by seepage, a rise in the waters of two soda lakes and the submergence of a plant which the appellant in that case, the John Horstmann Company, had built upon the border of one of the lakes for the extraction of soda. The case was a hard one, as the rise in the lake level, due to the construction of the Government irrigating system, eventually submerged the appellant's plant and permanently destroyed its value. Nevertheless, this court held that there was no "taking" of the appellant's plant, and therefore no implied contract to pay for the damage caused, because the work was done by the Government in the exercise of its right to build an irrigation system, and the consequences were only incidental.

The ground for this decision is that, as there can be no recovery against the Government for damages in cases arising out of tort, such immunity can not be destroyed by an implied "taking" of the property, which, in point of fact, has not been taken, but has only suffered some incidental and temporary damage, due to the work of necessary construction. Such a suit can only be based upon the theory of an

implied contract and such a contract can not be implied except where there is a conscious, deliberate, and unmistakable appropriation by the Government of private property. It is true that such a contract can be proven by acts, as well as words; but the acts must be such as indicate a conscious and deliberate appropriation of a property, and no contract can arise where the taking is merely a fiction of the law. This is especially true where the damage complained of is incident to the construction of a public work and where the thing damaged is itself subject to the paramount power of the Government to enter upon such public work.

This is well illustrated by the case of *Bedford* v. *United States* (192 U. S. 217). In that case the Government had constructed certain revetments along the banks of the Mississippi, in order to prevent the erosion of the banks by the waters, near the city of Vicksburg. The construction of these revetments caused a change in the course of the river, which in turn resulted in the overflow of the lands of a riparian owner, who thereupon sued and invoked the doctrine of the *Lynah case* (188 U. S. 445). This court, however, held that there was no taking, and that the plaintiff was without a remedy. It held that the Government could not be prevented or embarrassed in safeguarding the interests of the other riparian owners simply because its work might cause such change in the river as to injure the plaintiff. In all such cases the Government, under its power over the

immediate, and necessary effect was to cause a permanent overflow of the plaintiff's land. It was held by an almost equally divided court that this direct effect justified the implication that the Government intended the necessary consequences of its acts, and that this constituted a "taking," within the Fifth Amendment of the Constitution. It is obvious that the later cases which I have cited go far to modify the doctrine of the *Lynah case* and to restrict it to its own peculiar facts. In any event, it is distinguishable from the case at bar; for there is nothing in the findings of fact to show that, when the Government undertook to deepen the channel, it recognized that a certain result of the work would be some damage to the protection pier of appellant's bridge, which was already in a bad state of repair. For all that appears, the effect of the blasting was wholly unanticipated by the Government engineers. Moreover, in the *Lynah case*, the overflow of the plaintiff's land was permanent and thus—as a fact, and not as a mere fiction—the Government had taken his property in widening the river at that point.

In the case at bar there was no permanent submergence of the protection pier. The pier was merely damaged, partly by its already weakened condition due to decay, and partly by the action or the force of the waves. It would stretch the doctrine of implied taking very far to hold that such an unintentional and unanticipated damage was a taking of the protection pier which thereafter continued to remain in the possession of the

bridge company. Surely, if Government vessels had passed up the stream and the wash of their waves had done some incidental damage to the protection pier, it could hardly be contended that such damage was a "taking" of the protection pier by the Government.

In determining whether an implied contract rose to pay for damage necessarily incident to the construction of a public work, it should again be emphasized that the appellant company had no rights in the river, except by sufferance of Congress, and that it in part owed its franchise to the United States, which, by act of Congress of July 25, 1866, permitted the construction of the bridge (14 Stat. 245). Subsequently, the Government found it necessary, in the common interest, to deepen the channel. As a necessary incident to such work, the Government inflicted a slight injury upon a protection pier which only existed in the channel of the stream by its permission. Under these circumstances, an implication of an intention to pay for a purely fictitious taking finds no support in any reported case which I have found.

A contrary implication of an intention not to pay is supported by the leading case of *Bridge Co.* v. *United States* (105 U. S. 470), where Congress authorized the construction of a bridge across the Ohio River of a certain character, and, while it was in process of construction under its franchise, Congress, by subsequent statute, declared that it should be unlawful to proceed with the construction unless

certain specified changes were made. This court held that no contract could be implied to pay for such changes and that Congress could withdraw its assent to a bridge of a particular construction whenever it was necessary, in its judgment to do so, to protect the navigation of the river. This court said, at page 480:

> Congress, which alone exercises the legislative power of the Government, is the constitutional protector of foreign and interstate commerce. Its supervision of this subject is continuing in its nature, and all grants of special privileges affecting so important a branch of governmental power ought certainly to be strictly construed. Nothing will be presumed to have been surrendered unless it was manifestly so intended. Every doubt should be resolved in favor of the Government.

Apart from the foregoing considerations, the record presents a case of *damnum absque injuria;* for the findings of fact do not show that the appellant company was at any expense in rebuilding the old protection pier. They do say "that the pier was thus so damaged as to necessitate considerable repair or rebuilding"; but, for all that appears, before either repairs were made or rebuilding commenced, it became necessary, not on account of the Government's act, but because of the demands of commerce, to rebuild the bridge entirely for heavier traffic, and, in connection with such rebuilding of the bridge, an entirely new protection pier was constructed. For all that appears, even if the old protection pier had been repaired, it would have been necessary to sup-

plant it with an entirely new one for the new bridge. Thus the expense of building a new protection pier, which was the only expense incurred by the appellant, was necessitated by its own requirements and not by the act of the Government, and would have been neither more nor less if the Government had never damaged the old pier.

The case thus presents a fictitious taking with a fictitious damage, and such double fiction fully justified the Court of Claims in rejecting the appellant's claim.

Respectfully submitted.

JAMES M. BECK,
Solicitor General.

SEPTEMBER, 1922.

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MEMORANDUM OF ADDITIONAL AUTHORITIES.

The rule is well settled that to entitle an owner to the protection of the fifth amendment there must be a physical and permanent appropriation of the property or its necessary uses which would be equivalent to a practical ouster from possession. There is a clear distinction between temporary damage to a property through some governmental activity and such permanent taking. Thus in the case of *Transportation Company* v. *United States*, 99 U. S. 642, it was said:

> Acts done in the proper exercise of governmental powers and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision.

Many governmental operations incidentally and temporarily work injury to private property. During the Great War the big guns at Sandy Hook were repeatedly fired off, causing temporary inconvenience and even incidental damage to houses for miles around, but it was incident to the war operations in the national defense, and the property owners in the vicinity of Sandy Hook never dreamed that their property had been taken by this temporary use by the Government of one of its forts.

The same rule applies even to private operations, for it was well said by Chief Judge Bronson in *Radcliff* v. *Brooklyn*, 4 N. Y. 195:

> A fort, jail, workshop, fever hospital, or lunatic asylum erected by the Government may have the effect of reducing the value of a dwelling house in the immediate neighborhood, and yet no provision for compensating the owner of the house has ever been made in such case.

The doctrine is well stated in the later case of *Bedford* v. *United States*, 192 U. S. 224:

> The Constitution provides that private property shall not be taken without just compensation, but a distinction has been made between damage and taking, and that distinction must be observed in applying the constitutional provision.

The court then cited appropriately the case of *Gibson* v. *United States* (166 U. S. 269). In that case the claimant owned a farm on an island in the Ohio River valuable as a market garden. She had wharves upon the river and used them for the purpose of transporting the produce of her farm to the market. Congress authorized the improvement of the Ohio River by the construction of a dike which diverted the water entirely from the claimant's frontage, destroyed the only landing on the farm, and made it impossible for her to ship her produce by water. The court said:

> The fifth amendment to the Constitution of the United States provides that private

> property shall not "be taken for public use without just compensation." Here, however, the damage of which Mrs. Gibson complained was not the result of the taking of any part of her property, whether upland or submerged, or a direct invasion thereof, but the incidental consequence of the lawful and proper exercise of a governmental power.

In that case the claimant had acquired her farm before the dike was projected.

In *Chicago, Burlington & Quincy R. R. Co.* v. *Drainage Commissioners* 200 U. S. 561, the court, distinguishing the cases of damage from those of real taking, said:

> If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use and a right to compensation, on account of such injury, does not attach under the Constitution.

In the few cases where a permanent flooding has been regarded as a taking, such as *Pumpelly* v. *Green Bay Company*, 13 Wall. 166; *United States* v. *Lynah*, 188 U. S. 445, there was, as the court showed in the case of *Transportation Company* v. *United States*, 99 U. S. 642, "a practical ouster of his (claimant's) possession" and the court indicated that such practical ouster, obviously meaning a permanent ouster, was to be distinguished from the other class of cases "where all that was done was to render for a time its use more inconvenient."

This principle has been frequently applied in blasting cases. Thus in *Booth* v. *Railroad*, 140 N. Y. 262, the defendant in order to depress its roadbed below the surface of the street was obliged to blast the rock and as a result the plaintiff's house on an adjacent lot was injured. The court said:

> The test of the permissible use of one's own land is not whether the use or act causes injury to his neighbor's property, or that the injury was the natural consequence, or that the act is in the nature of a nuisance, but the inquiry is, Was the act or use a reasonable exercise of the dominion which the owner of the property has by virtue of his ownership over his property, having regard to all interests affected, his own and those of his neighbors, and having in view also public policy?

The same rule was made in *Benner* v. *Atlantic Dredging Co.*, 134 N. Y. 156, where the blasting of rock in order to clear the East River from the Hell Gate obstruction to navigation injured plaintiff's house by concussion. The court held that the effect of concussion was not a physical invasion of plaintiff's premises as there would have been if the débris of the blasting rock had fallen upon plaintiff's premises, and the court concluded:

> One can not confine the vibration of the earth or air within inclosed limits, and hence it must follow that, if in any given case they are rightfully caused, their extension to their ultimate and natural limits can not be unlawful, and the consequential injury, if any, must be remediless.

The moral justification for the rule is well stated by the Supreme Court of New Jersey in *Stevens* v. *Paterson Railroad Co.*, 34 N. J. L. 532, where the court said:

> Every citizen is required at times to contribute something, by way of sacrifice, to the public good. Such partial evil is the price which is paid for the advantages incident to the social state. It is not necessary to refer extensively to authorities in confirmation of the doctrine that, as a general rule, the public domain is subject altogether to the control of the legislature, and that incidental damage resulting to individuals from the exercise of such control gives no legal claim to compensation.

One further distinction can be drawn between cases of damage and cases of true taking: in the latter cases if the Government is called upon to compensate for a taking it is then entitled to the property. This was recognized in the case of *United States* v. *Lynah*, 199 U. S. 445, where it was said:

> The proceedings must be regarded as an actual appropriation of the land, including the possession and the fee, and, when the amount awarded as compensation is paid, the title, the fee, and whatever rights may attach thereto pass to the Government, which becomes henceforth the owner.

Of course such a test can not be applied to the case at bar. It is not pretended that if the United States had, as contended, taken the plaintiff's protection

pier that the plaintiff thereafter in any manner released its ownership of the pier. Its claim is not for property taken but for property damaged. It can not claim for damages because the Government can not be sued in tort, and it can not claim for a taking because after the blasting the protection pier even though in a damaged state was as much the property of the claimant as before.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1921

No. 58

KEOKUK & HAMILTON BRIDGE COMPANY,
A CORPORATION,

vs.

THE UNITED STATES,
APPELLANT.

APPEAL FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR APPELLANT.

F. T. HUGHES,
Solicitor for Appellant.

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REPLY BRIEF FOR THE APPELLANT.

We challenge the statement of the solicitor general in his brief that under the reserve power of Section 13 of the Acts of July 25, 1866, to alter or amend appellant's charter the Government could in the improvement of navigation of the river if it so orders cause appellant's bridge or its piers to be entirely removed and this as we understand without compensation. When appellant had accepted its charter to build its bridge and the same was built and approved by the Secretary of War this became a contract within the meaning of the *Dartmouth College* case, 4 Wheat., and the *Monongahela Navigation Company against United States*, 148 U. S. 312-341, and the authorities under page 13 of our brief, and the Government could only in any event cause appellant's bridge or piers to be destroyed or removed upon just compensation being paid within the Fifth Amendment to the Federal Constitution.

II.

The *Bedford case in* 192 U. S. 207 is an authority for appellant rather than that of appellee. The case only holds that the injury from overflow and erosions to the lands of a riparian proprietor as the result of the action of the Mississippi River through a series of years is not such a direct consequence of the construction by the Federal Government some six miles farther up the stream of a revetment along the banks which di dnot change the course of the river as it then existed, but operated to prevent further changes as to make such governmental action a taking of private property for public use within the meaning of the Fifth Amendment to the Federal Constitution.

The injury done to the claimant's land was an effect of natural causes. The injury caused by the Government was by interrupting the course of natural causes, i.e., the further change in the course of the river and is also conjectural.

So that the facts in the *Bedford case* are distinguished from the *Lynah case*, 188 U. S. 445, in the cause and manner of the injury. In the *Lynah case* the works were constructed in the bed of the river obstructing the natural flow of its water and held to have caused as a direct consequence the overflow of Lynah's plantation. So with the case at bar. The work of deepening the channel in the bed of the river was right along the side of appellant's protection pier and of necessity destroyed it. The Government knew in contemplation of law what would probably happen. It was not conjectural nor in doubt. The consequences and the damages was or could have been easily ascertained. As we show on page 29 of our brief, and this was a taking of appellant's property and calling for compensation under the Fifth Amendment.

Page 10 of his brief says that the record presents a case *damnum absque injuria* for the findings of fact do not show that the appellant company was at any expense in rebuilding the old protection pier

because as he states, "For all that appears before either repairs were made or rebuilding commenced it became necessary, not on account of government act, but because the demands of commerce to rebuild the bridge entirely for heavier traffic and in connection with such rebuilding of the bridge an entirely new protection pier was constructed." Therefore he argues that the destruction of appellant's protection pier was a benefit rather than a damage.

Not one word of the testimony can support this contention. On the contrary both the appellant and appellee show that the bridge was not reconstructed nor the old piers and protection piers touched and that under the authority of the Act of March 4, 1915, the appellant was bound to submit the plan for reconstruction in whole or in part to the Secretary of War for his approval and then Major Hoffman, Major Corps of Engineers, and who spoke for the Secretary of War says, "Nothing in the way of repairs or reconstruction therefor was done and authority for a *new superstructure* was finally granted and the work is *now proceeding* towards completion." This of itself shows that the piers of the bridge and protection piers were not and could not be effected by the rebuilding of the superstructure to accommodate heavier traffic. M. Meigs, U. S. C. E., of this city, shows that the plan for reconstruction of the Keokuk & Hamilton bridge at Keokuk, Iowa, 1915, had nothing to do with the old piers but simply a new superstructure with the main floor of the bridge exclusively for railroad trains and the upper floor for vehicular and pedestrian travel and the affidavits in appendix to our brief page 31 shows by all the authorities that nothing was done to the piers nor could have been done under authorities of the Government and therefore the claim that the damage done by the blasting was slight and did not necessitate the rebuilding of the pier is without any color of fact or authority in law whatever and the undisputed testimony of Cole, the manager of the bridge and two or three other persons on the bridge and others who knew about it, testified that the blasting lasted for some months and absolutely destroyed the protection pier so as to require an entirely new pier and that was the only reason for making a new pier, and the finding of the court below to the effect that the damage was about one

thousand dollars and the reconstruction of the pier was necessitated by the acts of the appellant is without any evidence whatever, and as we have said a finding against the undisputed evidence and all the facts and circumstances in the case is not a finding that prevents the appellant from raising this question in this court of the finding as a matter of law and this finding should have been for appellant instead of appellee.

The case as we present it does not show a "fictitious taking with a fictitious damage", but an actual taking and an actual damage.

Respectfully submitted,

F. T. HUGHES,
Solicitor for Appellant.

September, 1922.

Mr. Solicitor General Beck for the United States.

MR. JUSTICE HOLMES delivered the opinion of the Court.

The appellant had an authorized bridge across the Mississippi River with a pivot pier and draw to permit the passage of vessels. As a necessary incident it maintained what is called a protection pier extending down stream. In consequence of later authorized constructions it became necessary to deepen the channel on the easterly side of the pier, and the part of this work with which we are concerned was done by the United States. The bed of the stream by the side of the pier was solid rock and into this the United States drilled and blasted it with dynamite. The work was done in the usual way and with more than ordinary care; but by the action of the water driven upon the pier by the blasts, and possibly by the concussion of the blasts themselves, portions of the pier fell into the river, and some damage was inflicted. It could have been repaired for $1,000. The Company however rebuilt the bridge to fit it for heavier traffic, and brought this suit alleging that the pier was destroyed and in that way taken by the United States.

An appreciable part of the claimant's argument consists in an attempt to reopen the findings of fact and to maintain that the pier was destroyed, as giving more force to the contention that it was taken. This, of course, is vain. *Union Pacific Ry. Co.* v. *United States*, 116 U. S. 154. *Talbert* v. *United States*, 155 U. S. 45. We must assume, as we have stated from the findings of the Court of Claims, that the pier was not destroyed but simply was damaged in a way that could have been repaired for a moderate sum. However small the damage, it may be true that deliberate action in some cases might generate the same claim as other forms of deliberate withdrawal of property from the admitted owner. *United States* v.

Cress, 243 U. S. 316, 329. But without considering how the line would be drawn, when such action took place in the improvement of navigation, it is enough to say that this is an ordinary case of incidental damage which if inflicted by a private individual might be a tort but which could be nothing else. In such cases there is no remedy against the United States. See *Bedford* v. *United States*, 192 U. S. 217, 224.

Judgment affirmed.

KEOKUK & HAMILTON BRIDGE COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 58. Argued October 13, 1922.—Decided November 13, 1922.

1 The Court will not reëxamine the findings of fact made by the Court of Claims upon evidence. P. 126.

2. An unintentional injury to a bridge pier in the making of navigation improvements by the Government, *held* at most in the nature of a tort, and not a taking of property by the United States for which damages might be recovered on the theory of contract. P. 126.

55 Ct. Clms. 480, affirmed.

APPEAL from a judgment of the Court of Claims dismissing the petition in an action to recover the value of a pier, alleged to have been destroyed, and hence taken, by the act of the United States.

Mr. F. T. Hughes, for appellant, submitted.